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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THEODORE BRENNER, d/b/a
Teddy Brenner Enterprises,

Petitioner,

—v.—

WORLD BOXING COUNCIL and
JOSE SULAIMAN CHAGNON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 16, 1982

Questions Presented for Review

1. Whether a conspirator's invocation of the Fifth Amendment in an antitrust conspiracy case gives rise to an adverse inference against his co-conspirators.

2. Whether it is reversible error to dismiss, at the close of an antitrust plaintiff's case in chief, an antitrust conspiracy claim against a self-appointed sports regulatory group, its president, and a competitor, where the trial record shows that the self-regulatory group boycotted the antitrust plaintiff by suspending him and ordered persons contractually committed to him to deal with his competitor, and where the competitor (an alleged co-conspirator) was excused from testifying at trial on the ground that his blanket invocation of the Fifth Amendment at his pretrial deposition rendered him "unavailable" to testify.

3. Whether it is a per se illegal group boycott under Section 1 of the Sherman Act for a self-appointed sports regulatory group to condition a boxing promoter's ability to promote championship contests upon the promoter's payment of money to his competitor.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

THEODORE BRENNER, d/b/a
Teddy Brenner Enterprises,

Petitioner,

v.

WORLD BOXING COUNCIL and
JOSE SULAIMAN CHAGNON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Theodore Brenner, d/b/a Teddy Brenner Enterprises ("Brenner"), respectfully prays that a Writ of Certiorari

issue to review the Order of the United States Court of Appeals for the Second Circuit entered in this action on March 18, 1982, and the Judgment entered on May 3, 1982.

Opinion Below

The opinion of the Court of Appeals for the Second Circuit is not yet officially reported and is reproduced in Appendix A of this Petition. The Judgment of the Court of Appeals is also reproduced in Appendix A.

Jurisdiction

The opinion of the Court of Appeals for the Second Circuit was issued on March 18, 1982. On May 3, the Court of Appeals entered Judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

Relevant portions of the following constitutional and statutory provisions appear in Appendix B:

CONSTITUTION:

Amendment V

STATUTES:

Sections 4 and 16 of the Clayton Act, 15 U.S.C. § 15, 26 (1976)

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976)

Statement of the Case

Brenner, a promoter of professional boxing matches who has been substantially connected with boxing for 35 years, commenced this action to recover money damages and to obtain injunctive relief for violations of Section 1 of the Sherman Act. The complaint, as amplified by the pretrial order, alleges a successful conspiracy

and group boycott to exclude Brenner from competing in the market for the promotion of championship boxing matches in the United States. The conspiracy is alleged to have included boxing promoter Don King, the members of the World Boxing Council ("WBC"), a self-appointed and for-profit regulatory group, and its president, Jose Sulaiman. The object and effect of the conspiracy and boycott was the exclusion from a highly concentrated market of one of the few entrepreneurs capable of engaging in effective competition.

The Court of Appeals sustained in all respects the district court's dismissal of Brenner's conspiracy claim at the close of his case. The Court of Appeals also sustained the district court's decision to sanction King's blanket invocation at deposition of the Fifth Amendment, and to

quash the trial subpoena served by Brenner on King on the ground that King was "unavailable." Finally, the Court of Appeals held that Brenner was not entitled to an adverse inference charge against Sulaiman and the WBC with respect to King's invocation of the Fifth Amendment.

Reasons for Granting the Writ

This Court has never considered the circumstances under which a co-conspirator in a civil antitrust action may, without adverse consequences to either himself or his co-conspirators, deliberately and substantially frustrate the fact-finding process by invoking the Fifth Amendment. In prior decisions, this Court has held that the invocation of the Fifth Amendment by a witness in a civil case may be considered by the jury as evidence that, if he had responded, the answer would be adverse to

his interests.* Baxter v. Palmigiano, 425 U.S. 308, 319 (1976); United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923). See also Campbell v. Gerrans, 592 F.2d 1054, 1058 (9th Cir. 1979); United States v. Mammoth Oil, 14 F.2d 705, 730 (8th Cir. 1926), aff'd, 275 U.S. 13 (1927); cf. 3A J. Wigmore, Evidence § 1042 at 1956-58 (Chadbourn rev. ed. 1970); United States v. Maloney, 262 F.2d 535, 537 (2d Cir. 1959) ("when a witness claims his privilege, a natural, indeed an almost inevitable, inference arises as to what would

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* As one commentator has noted:

> [S]ince there is no privilege to withhold information because it might be civilly damaging and since the inference made in a civil case cannot have any ramifications in a later criminal proceeding, the full protection of the constitutional privilege does not require a refusal to draw an inference in a civil case unfavorable to the party asserting the privilege.

Note, Use of Privilege Against Self-Incrimination in Civil Litigation, 52 Va. L. Rev. 322, 340 (1966).

have been his answer if he had not refused").

The Court of Appeals, however, departed from this principle and effectively held that antitrust conspirators are to be shielded from civil liability on the theory that the conduct of their co-conspirator might be criminal. This evidentiary principle is not well calculated to serve the principles of private antitrust enforcement. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1006 (9th Cir. 1973), cert. denied, 409 U.S. 1125 (1973). Certainly it speaks volumes about the logic brought to bear by the district court in dismissing Brenner's conspiracy claim.*

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* In E. H. Boerth Co. v. LAD Properties, 82 F.R.D. 635 (D. Minn. 1979), the court instructed the jury that it could draw an adverse inference from a witness' refusal to answer specific inquiries, and that such inferences could be drawn against the witness'

Petitioner submits that, in affirming the dismissal at the close of his case

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(Footnote continued)

employer. The agency principle applied in LAD to justify an adverse inference against an employer is the same principle that justifies such an inference against a co-conspirator.

The Boerth case is consistent with cases in other jurisdictions. Thus, in Ralph Hegman Co. v. Transamerica Insurance Co., 198 N.W. 2d 555, 557 (Sup. Ct. Minn. 1972), the court relied upon the principal-surety relationship to hold that a jury could properly draw an inference adverse to the defendant surety by reason of the principal's invocation of the Fifth Amendment. Cf. FRE 801(d)(2)(E). The Boerth rationale was most recently applied in Labor Relations Commission v. Fall River Educators Association, 416 N.E.2d 1340, 1344-45 (Mass. Sup. Ct. 1981), in which the court held that the refusal of defendant's officers to testify at a hearing on Fifth Amendment grounds warranted the drawing of an inference adverse to the Association. See also United States v. Mammoth Oil, supra, 14 F.2d at 730; Malloy v. Malloy, 176 N.W.2d 292, 296 (Sup. Ct. Wis. 1970); Kaminsky, Preventing Unfair Use of the Privilege Against Incrimination in Private Civil Litigation; A Critical Analysis, 39 Brooklyn L. Rev. 121, 152-53 (1972); Note, Use of Privilege Against Self-Incrimination in Civil Litigation, supra, 52 Va. L. Rev. at 322-32.

of his antitrust claims, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned a departure by the district courts which will consider numerous similar pending cases, as to call for the exercise of this Court's power of supervision.

This Court has consistently recognized that "the existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide." Adickes v. Kress & Co., 398 U.S. 144, 196 (1970) (Black, J., concurring). "[I]t is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.'" Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 700-701 (1962). Thus, it has been held that a conspiracy claim must be submitted to the jury if the evidence permits the inference

that the alleged conspirators "had a unity of purpose or a common design and understanding, or a meeting of the minds." American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946); Adickes v. Kress & Co., supra, 398 U.S. at 158-59; Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979), mod. on other grounds, 446 U.S. 754 (1980); cf. Beech Cinema, Inc. v. Twentieth Century-Fox Film Corp., 622 F.2d 1106 (2nd Cir. 1980).

Petitioner's conspiracy allegations raise jury questions on their face. The dismissal of the conspiracy allegations against the WBC and its president cannot be reconciled with this Court's very recent decision in American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation, Case No. 80-1765 (May 17, 1982). There, this Court affirmed an antitrust judgment against a non-profit membership corporation which had frustrated competition through the misuse of its self-regulatory power.

As this Court recognized in the ASME case, a self-regulatory agency like the WBC is "'in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce.' Fashion Originators' Guild v. FTC, 312 U.S. 457, 465 (1941)." The Court of Appeals recognized that the WBC controls access to an economic market, but nevertheless sanctioned the WBC's decision to condition Brenner's access to the market upon his adherence to terms laid down by King. Cf. Associated Press v. United States, 326 U.S. 1 (1945); Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 458 (1945); cf. Fashion Originators' Guild of America, Inc. v. FTC, supra; United States v. Nationwide Trailer Rental System, Inc., 156 F. Supp. 800, 805 (D. Kan.), aff'd, 355 U.S. 10 (1957). While the Court of Appeals found that the WBC's conduct was not conspiratorially motivated, this determination was a jury issue.

Finally, review by this Court is necessary to reconcile a conflict between decisions of this Court and the Court of Appeals for the Second Circuit on the elements of a per se illegal boycott. This Court has condemned group boycotts as "naked restraints of trade" having no purpose other than to eliminate or stifle competition, Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-13 (1959); Fashion Originators' Guild of America, Inc. v. FTC, supra, and has consistently held that group boycotts are illegal per se (i.e., illegal regardless of the reasonableness of their claimed purpose or business justification). Fashion Originators' Guild of America, Inc. v. FTC, supra; Klor's Inc. v. Broadway-Hale Stores, Inc., supra, 359 U.S. at 212; Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656, 659-60 (1961); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); United States v. General

Motors Corp., 384 U.S. 127 (1966).

Prior to this case, no sports group has ever escaped per se condemnation for acts that lessen commercial competition unless those acts were essential to assure that the sport would be fairly contested. Compare Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979), and Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y.), with Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977). In this case, the Court of Appeals affirmed the dismissal of Brenner's case after finding that King engaged in a variety of predatory practices against Brenner, and that the WBC suspended Brenner principally because Brenner did not compromise a spurious contract claim asserted by King. It is, however, no part of the WBC's regulatory sanction to determine contract disputes between promoters, or to bar access to the marketplace on the ground that the excluded

party failed to pay money to a competitor. Madison Square Garden Boxing, Inc. v. Shavers, 562 F.2d 141, 144 (2d Cir. 1977).

The WBC stifled competition by substituting its private and corrupt government for the rule of the marketplace. Under classic antitrust theory, this restraint upon competition is so pernicious and destructive that it is per se illegal. Cf. Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4-5 (1958).

Conclusion

For all the foregoing reasons, Petitioner respectfully submits that the errors identified in the Opinion below warrant correction by this Court and the issuance of a Writ of Certiorari to the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 384, 431—August Term, 1981

(Argued: November 25, 1981 Decided: March 18, 1982)

Docket Nos. 81-7478, 81-7556

THEODORE BRENNER, d/b/a
Teddy Brenner Enterprises,

Plaintiff-Appellant,

—against—

WORLD BOXING COUNCIL and
JOSE SULAIMAN CHAGNON,

Defendants-Appellees.

Before:

KAUFMAN, TIMBERS and MESKILL, *Circuit Judges.*

Appeal from a judgment entered after a jury trial by the United States District Court for the Southern District of New York, Charles M. Metzner, *Judge*, dismissing Theodore Brenner's complaint, which charged the World Boxing Council and its president, Jose Sulaiman Chagnon, with engaging in an unlawful conspiracy and a group boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). Brenner also appeals from the denial of his motion for judgment notwithstanding the verdict or in the alternative for a new trial on the group boycott claim, and from an

order preserving costs taxed against him and relieving appellees from costs previously taxed.

Affirmed.

PAMELA G. OSTRAGER, New York, New York (Carleton G. Eldridge, Jr., Coudert Brothers, New York, New York, of counsel), *for Plaintiff-Appellant.*

ELLEN S. HUVELLE, Washington, D.C. (Richard M. Cooper, Williams & Connolly, Washington, D.C., Melvin Simensky, New York, New York, of counsel), *for Defendants-Appellees.*

MESKILL, *Circuit Judge:*

Theodore "Teddy" Brenner, a promoter of boxing matches, appeals from a judgment entered after a jury trial by the United States District Court for the Southern District of New York, Charles M. Metzner, *Judge*, dismissing his complaint, which charged the World Boxing Council ("WBC") and its president, Jose Sulaiman Chagnon ("Sulaiman"), with engaging in an unlawful conspiracy and a group boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). Brenner also appeals from Judge Metzner's denial of a motion for judgment notwithstanding the verdict or in the alternative for a new trial on the group boycott claim, and from an order preserving costs taxed against him and relieving appellees from costs previously taxed.

In addition, Brenner challenges the grant of appellees' motion for a directed verdict on his Section 1 conspiracy claim, the jury instructions on his group boycott claim, the trial court's handling of a witness' testimony, and the awarding of costs to appellees. For the reasons set forth below, we affirm the judgment and orders of the district court.

BACKGROUND

As this case demonstrates, when you are attempting to promote a professional championship boxing match, you had better keep your guard up. The main participants in this legal contest are Teddy Brenner, a promoter of boxing matches for over forty years, the WBC, one of the two dominant international boxing regulatory bodies,[1] its president Jose Sulaiman Chagnon, and Don King, a competitor of Brenner. Because this is an appeal from, *inter alia*, the dismissal of Brenner's Section 1 conspiracy claim, we will, as we must, consider the evidence, as complicated as it is, in the light most favorable to the appellant. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 n.6 (1962).

The chronology of events giving rise to this lawsuit began on January 28, 1978 when Alexis Arguello captured the WBC super featherweight championship from Alfredo Escalera. The next day, Arguello's manager, Dr. Eduardo Roman, signed a contract with fight promoter Don King for a rematch.

Months later, on July 26, Arguello and Roman entered

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[1] The World Boxing Council is a non-profit sports regulatory body formed in 1963 to promote the organized, uniform and honest presentation of professional boxing matches around the world. The principal functions of the WBC are to recognize WBC world championship boxers in various weight classes, to prescribe a system of ranking fighters, to designate minimum defense requirements of champions, and to establish rules governing the conduct of WBC bouts. The governing body of the WBC is the executive committee, which is composed of two members from each of the seven continental federations, the three vice-presidents, the secretary general and the president of the WBC. The members of the executive committee receive no compensation and have no commercial interests in boxing. Non-voting or associate memberships to the WBC are open to any party wishing to affiliate itself with the WBC. These members, which include state boxing commissions, boxers, managers and promoters, receive WBC publications, and are entitled to attend WBC conventi[illegible] ss. Tr. 794-817; Pl. Ex. 153, World Boxing Council Constitution, By Laws, [illegible] des and Regulations.

The other dominant boxing regulatory body is the World Boxing Association (WBA). Like, the WBC, the WBA promotes championship boxing matches around the world. Tr. 818-819.

into a contract with New York's Madison Square Garden granting the Garden the right of first refusal for all of Arguello's bouts for one year. At the time, Brenner was president of boxing at the Garden. The agreement stipulated that it would remain in effect only as long as Brenner retained that position. Brenner left the Garden and became an independent boxing promoter on September 1. One month later, Brenner signed a contract with Arguello and Roman which gave Brenner the right to promote Arguello's bouts for the next three years.

On October 20, with the Arguello contract apparently secured, Brenner contracted with CBS Sports for the telecast of an Arguello-Escalera rematch. Escalera signed a contract for the fight on October 25, but under the terms of the contract, Escalera and his business manager, Paul Ruiz, retained the right to void the contract by notifying Brenner prior to November 4. On October 26, Ruiz negotiated an agreement with Don King for the promotion of the same fight, but that agreement was neither signed by Escalera nor dated. Ruiz contacted Brenner that same day and informed him of the offer from King. When Brenner agreed to up the ante, Ruiz signed an irrevocable contract with Brenner for the fight. Meanwhile, Don King predated his October 26 contract with Ruiz to September 5 and submitted it to Jose Sulaiman on October 27.

Sometime later Roman, despite Arguello's exclusive contract with Brenner, signed a contract with Don King for an Arguello-Arturo Leon bout. On the eve of that bout, Roman entered into another contract with King for Arguello's next fight, against Bobby Chacon. Then on November 7, 1978, Roman contracted with Brenner for an Arguello-Escalera fight to take place on February 3, 1979, provided there was no conflict with the Chacon bout.

The WBC held its annual convention from December 4 through December 7, 1978. Don King attended and submitted his contracts for the Arguello-Escalera and Arguello-

Chacon bouts to the convention.[2] The convention refused to certify these bouts, instead directing Arguello to defend his title against the WBC's number one rated contender, Rafael "Bazooka" Limon as required by WBC rules.[3]

Shortly afterward, Brenner informed Sulaiman that he had signed contracts with Arguello and Escalera and with CBS for a rematch, and that he needed WBC sanction for the fight in order to launch his career as an independent promoter and to establish his credibility with the television networks. Sulaiman responded that although the convention had already voted to have Arguello fight Limon, he would nevertheless try to help Brenner by taking the matter back to the convention.

The following day, the convention reconsidered the matter of Arguello's next title defense, and voted to certify Brenner's Arguello-Escalera match provided three conditions were met: (1) Limon agreed to step aside; (2) Brenner's match would not be postponed; and (3) any dispute between Brenner and King over the Arguello-Escalera bout would be resolved either by agreement or in court.

Meanwhile, by letter dated December 6, 1978, Don King informed CBS that he claimed rights to the Arguello-Escalera fight. On December 8, 1978, King telegraphed Sulaiman that he had not relinquished his rights to the Arguello-Escalera

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[2] Under the WBC rules all contracts for world title fights must be submitted to the WBC within 30 days of signing. Further, all title fight contracts must be registered at the WBC offices. Article XII §§ 9-10, World Boxing Council Constitution, By Laws, Rules and Regulations.

[3] Under the WBC rules then in effect, a champion in a weight division was required to defend his title in a "mandatory defense" at least once a year against the number one rated contender, unless the contender was unwilling or unable to participate in the fight, in which case the champion was required to meet the next highest rated available contender. Art. XII § 1, World Boxing Council Constitution, By Laws, Rules and Regulations. The purpose of this rule was to prevent the champion from avoiding the worthiest opponents. Tr. 832-36. A champion may be stripped of his title for violating this rule. Art. XII § 2, World Boxing Council Constitution, By Laws, Rules and Regulations.

fight and that he had a contract for a prior bout between Arguello and Chacon.

The following day, Roman informed King that while he had signed with King for the Arguello-Chacon bout, he had signed with Brenner for the Arguello-Escalera match. On December 11, Escalera's manager telegraphed Brenner to confirm that Brenner was the promoter of the fight.

In a December 13 telegram and a December 17 letter, Brenner reiterated to Sulaiman that he, not King, had the rights to the Arguello-Escalera fight and enclosed in the letter a copy of his exclusive contract with Arguello.

Sulaiman responded that the WBC had competing contracts submitted by King, and that the convention had decided that Brenner would receive WBC approval for the fight only if his dispute with King was resolved. About this time, Ruiz telephoned Sulaiman to discuss the promotion of the Arguello-Escalera fight. Sulaiman stated that he had a contract signed by Arguello for the Escalera bout to be promoted by Don King. Ruiz told Sulaiman that he had spoken to Roman, who had denied that Arguello ever signed with King. Sulaiman responded that he was going to remain neutral, and that it was up to King and Brenner to resolve the dispute.

Thereafter, Brenner and King, using Sulaiman as a mediator, attempted to reach a settlement. King offered to relinquish his rights to the fight for $50,000. Brenner then retained boxing promoter Bob Arum to negotiate on his behalf. Arum counter-offered $15,000. King in turn submitted $25,000 as a settlement price. At that point, Brenner elected to handle the negotiations by himself, dismissing Arum.

Meanwhile, by a letter dated December 20, CBS cancelled its contract with Brenner stating that its legal department had determined that Brenner did "not own all of the necessary ancillary rights to grant to CBS Sports exclusive television broadcast rights to [the fight]." Thereafter, in an attempt

to solidify his position, Brenner brought an action[4] seeking to enjoin King from interfering with Brenner's Arguello-Escalera match. On January 12, 1979, Brenner's motion for an injunction was denied.

Despite this setback, on January 12, 1979, Brenner entered into a television contract with ABC Sports for the fight. In addition, on January 17, Brenner sent Sulaiman a letter purporting to confirm that the WBC had sanctioned Brenner's Arguello-Escalera bout and that the fight took precedence over King's Arguello-Chacon fight.

On January 23, Brenner delivered to King a $25,000 check postdated to Monday, February 5, 1979, the day after the scheduled Arguello-Escalera fight as consideration for the settlement, a copy of each going to Sulaiman.

Upon receipt of Brenner's check, King called Sulaiman, protesting the postdating of the check and asking Sulaiman to stop the fight. Sulaiman refused, citing the adverse publicity that would result if the WBC cancelled a title bout on such short notice. Sulaiman did call Brenner, however, who explained that he had postdated the check to insure that the fight would take place and promised that King would be paid after the fight. By letter to Sulaiman dated January 30, 1979, King stated that in addition to the $25,000 settlement figure, the parties had agreed that King would promote a fight between the winner of the Arguello-Escalera match and Rafael Limon, and a subsequent defense against Bobby Chacon. King delivered a copy of the letter to Brenner, who, two days later, informed King and Sulaiman that because of the differing terms set forth in the letter, he had stopped payment on the check.

The Arguello-Escalera fight occurred on February 4, 1979, and Brenner realized over $14,000. Subsequently, Sulaiman

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[4] The record does not indicate whether Brenner's suit for an injunction against King was filed in a state or federal court. We do not need an answer to that question in order to decide this appeal.

tried unsuccessfully to determine whether Brenner would pay King. Then, in a February 15 letter, Sulaiman charged Brenner with sundry violations of WBC rules and requested that he either fulfill his obligations to the WBC or present his case to one of the two WBC investigatory committees—the Grievance and Appeals Committee or the Disciplinary Committee. In the letter, Sulaiman asserted that Brenner had failed to present a promoter's license to the WBC, to pay his 1979 promoter's fee, or to register the contracts for the Arguello-Escalera bout with the WBC. Further, the letter stated that Brenner had failed to comply with the three preconditions to acquiring WBC approval for the Arguello-Escalera fight outlined at the WBC convention.

That same day, Sulaiman sent a letter to the WBC's executive committee recounting the course of the settlement negotiations between Brenner and King, the agreement reached by the parties, and Brenner's subsequent refusal to pay the $25,000 to King. Sulaiman also stated that he was sending King a check for the amount owed by Brenner[3] and that Brenner should not be allowed to promote WBC title fights until he fulfilled his "commitments."

Using Brenner's associate Don Majeski as an intermediary, Sulaiman scheduled a meeting with Brenner to be held in Mexico. On advice of counsel, however, Brenner decided not to attend. On February 27, 1979, Sulaiman again wrote to the executive committee of the WBC outlining the history of the dispute with Brenner and urging the committee to vote on an attached ballot to suspend Brenner from the WBC until he fulfilled his commitments or explained to the WBC why he had not done so. Thereafter, Sulaiman telephoned all members of the executive committee but one, explained the situation and offered his reasons for recommending suspension. All of the members contacted voted for Brenner's suspension.

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[3] Sulaiman did in fact send King a check for $25,000, which King returned to Sulaiman uncashed.

Following the polling of the executive committee, Sulaiman made further abortive attempts to meet with Brenner. Finally, Sulaiman informed Brenner by a letter dated May 2, 1979 that he was suspended from promoting WBC world title fights because of his failure to comply with his commitments. Sulaiman also informed Brenner that he could appeal the suspension to the Grievance and Appeals Committee or to the Disciplinary Committee of the WBC. Brenner neither responded to this letter nor availed himself of either appeals procedure.

Thereafter, Sulaiman made other attempts to meet with Brenner including an attempt at the WBC convention in December 1979. Brenner, however, failed to attend the convention. Finally, Brenner and Sulaiman met later that month. At that meeting Brenner requested that his suspension be lifted immediately to enable him to promote an Arguello-Ruben Castillo match. Brenner offered to produce a check for the $25,000 owed to King if Sulaiman would agree to guarantee the fight. Sulaiman offered to do his best, but stated that the lifting of Brenner's suspension was up to the executive committee and that he therefore could not give a guarantee.

Nothing further occurred until February 14, 1980, when Brenner filed a complaint in the United States District Court for the Southern District of New York charging the WBC and Sulaiman with conspiring to exclude Brenner "from competition in the promotion and exhibition of and the sale of television rights in professional championship boxing contests in the United States" in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). J. App. at 19a. Appellees denied these allegations and filed four counterclaims, each arising out of the WBC certification of the Arguello-Escalera match promoted by Brenner.[6]. In Decem-

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[6] Appellees counterclaims alleged: (1) breach of contract; (2) misrepresentation and deceit; (3) misappropriation and invasion of privacy; and (4) unjust enrichment. J. App. at 26a-37a

ber 1980, Sulaiman and the WBC moved for summary judgment dismissing the complaint, and for partial summary judgment on their counterclaims. Brenner too moved for summary judgment, alleging that his suspension constituted a group boycott that was *per se* illegal under Section 1 of the Sherman Act. Brenner also moved for summary judgment dismissing defendants' counterclaims.

By an opinion and order dated February 6, 1981, Judge William C. Conner denied all motions. Thereafter, the case was transferred to Judge Charles M. Metzner. The issues framed for trial were, *inter alia*, whether Sulaiman and the WBC had conspired with boxing promoters, including Don King, to eliminate Brenner as a competitor and had engaged in a group boycott by suspending Brenner from promoting WBC world title fights. Don King invoked his Fifth Amendment privilege in response to all questions presented to him at pretrial depositions and Judge Metzner granted appellees' motion to quash the trial subpoenas of King and Don King Productions, Inc., finding King to be unavailable to testify at trial.

At the conclusion of Brenner's case, Judge Metzner entered a directed verdict for the appellees on Brenner's Section 1 conspiracy charge, finding that "there [were] no facts in this record from which a jury may draw a reasonable inference that a conspiracy existed between King and Sulaiman to have the World Boxing Council suspend Brenner and restrain competition in the field of boxing promotion." J. App. at 114a. In addition, Judge Metzner dismissed three of appellees' counterclaims, and limited recovery on the remaining counterclaim to $1,500. Following the denial of crossmotions for a directed verdict, the case was submitted to the jury. Judge Metzner instructed the jury that it must find for Brenner if he proved by a fair preponderance of the evidence: (1) that his suspension was effected by the WBC and Sulaiman for the purpose of preventing Brenner from engaging in his trade; or (2) that appellees' conduct did not fall within the recognized exception to *per se* group boycotts. After two

and one-half days of deliberation, the jury found for appellees on the group boycott claim and for Brenner on the counterclaim. Accordingly, the district court entered judgment dismissing the complaint and the counterclaims.

Brenner then moved unsuccessfully for judgment notwithstanding the verdict or, in the alternative, for a new trial on his group boycott claim. Judge Metzner also ruled that costs awarded to Brenner should be stricken.

DISCUSSION

On appeal, Brenner contends that the record is sufficient to support a reasonable inference of a Section 1 conspiracy, and that his suspension by the WBC constitutes a group boycott. Further, Brenner challenges the trial court's ruling with respect to the testimony of Don King, and claims that the court abused its discretion in awarding costs to appellees while denying costs to him.

I. *The Section 1 Conspiracy Claim*

In order to establish an unlawful conspiracy under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), a plaintiff must prove that two or more persons acted in concert to restrain trade. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *see Fuchs Sugars & Syrups, Inc.* v. *Amstar Corp.*, 602 F.2d 1025, 1029 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979). Concerted action need not be proved directly, but can be based upon circumstantial evidence; for example, from inferences drawn from the words and conduct of the parties to the agreement and from their course of dealing, *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969) (*per curiam*); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809-10 (1946). However, at a minimum "the circumstances [must be] such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1043

(2d Cir.), *cert. denied*, 429 U.S. 885 (1976) (quoting *American Tobacco Co.* v. *United States*, 328 U.S. at 810).

In the instant case, Brenner asserts that his evidence established, *inter alia*, that: (1) he had valid contracts to promote an Arguello-Escalera bout; (2) King falsely asserted rights to the fight; (3) Sulaiman and the WBC were aware of the falsity of King's claims; (4) despite this knowledge, the WBC and Sulaiman compelled Brenner to pay King $25,000 in order to obtain WBC certification for the Arguello-Escalera fight; (5) Brenner agreed to pay King, and then King reneged on the agreement by asserting additional terms; (6) when Brenner refused to yield to these new demands made by King, Sulaiman suspended Brenner; and (7) as a result of the suspension, King reaped all of the financial benefits of Brenner's exclusive service contract with Arguello. Reply Br. for Brenner at 3-5. Brenner contends that these facts support a reasonable inference that appellees engaged in a conspiracy to promote the interests of King and to place Brenner at a competitive disadvantage in the promotion of boxing matches. We conclude, however, that Brenner's evidence did not establish each of these facts, and that those facts which were established do not support a reasonable inference of a conspiracy.

The evidence taken in the light most favorable to Brenner established that Brenner and Don King competed for the promotion of an Arguello-Escalera rematch, and that both promoters acquired signed contracts for the bout. Then, King predated his contract with Escalera before submitting it to the WBC for approval. Even assuming that King's contracts for the fight were invalid, there is no evidence in the record that the WBC or Sulaiman knew prior to the WBC convention that they were invalid. In addition, despite having contracts signed by both fighters, Brenner neither informed the WBC nor submitted his contracts to it prior to the convention.

When the convention assembled in December 1978, it had received only King's contracts for the Arguello-Escalera and

Arguello-Chacon fights. The convention nevertheless set these contracts aside, and decreed that in accordance with its mandatory title defense rule, Arguello would have to fight Rafael "Bazooka" Limon before he could fight Escalera. Soon thereafter, Brenner telephoned Sulaiman, informing him that he had signed contracts for an Arguello-Escalera bout to take place in February 1979. Although the convention had set aside King's contracts for the same fight, Sulaiman promised to reintroduce the matter and thereby aid Brenner in his attempt to establish himself as an independent promoter. After reconsideration, the convention agreed to allow Brenner's Arguello-Escalera bout to take precedence over a Limon bout provided that, *inter alia*, Brenner settled the dispute over the promotion of the fight with Don King in court or by agreement.

Thereafter, Brenner and his attorneys sought to resolve the matter by attempting to prove that King's claims to the fight were invalid. First Brenner and then Roman, Arguello's manager, wrote to Sulaiman challenging the validity of King's contracts. By mid-December 1978, Sulaiman had in his possession both Brenner's and King's contracts for the fight as well as Brenner's exclusive service contract with Arguello. Sulaiman did not, however, side with either of the promoters, but adhered to the terms laid down by the convention. He reiterated this position to Escalera's manager, Ruiz, who, like Brenner and Roman, had attempted to persuade Sulaiman to declare King's contracts invalid. Certainly, Sulaiman owed no duty to Brenner to referee this contest.

Once it was evident that Sulaiman would not become involved in determining the validity of the contracts, Brenner attempted to settle with King. He did not negotiate directly, but elicited the assistance of Bob Arum and Sulaiman. Acting as intermediary, Sulaiman was able to persuade King to cut his demand in half. When Brenner was informed of King's counter-offer of a $25,000 settlement he indicated that he would handle the remaining negotiations. Brenner,

however, waited one month, until almost the eve of the fight to contact King and to formalize the agreement. During that time, he had instituted a suit seeking to enjoin King from interfering with his promotion of the fight. After the injunction was denied, Brenner sent King a letter confirming the agreement and enclosing a postdated check.

Throughout this period, King was attempting to undermine Brenner's ability to promote the fight. First he submitted his fight contracts to CBS, causing the network to cancel its television contract with Brenner. In addition, upon receipt of Brenner's postdated check, King attempted to convince Sulaiman to cancel the fight. Sulaiman refused, adhering to the convention's decision to award Brenner the rights to the fight. When this approach failed, King sent Sulaiman a letter with a copy to Brenner, adding new terms to the agreement.

Upon receipt of King's letter, Brenner stopped payment on the check. However, he waited until two days before the fight to inform Sulaiman that payment had been stopped. The bout was held as scheduled. Yet, despite his understanding with the WBC, Brenner never paid King. Furthermore, despite repeated opportunities, he never attempted to explain to the WBC why he had not done so. Three months after the fight, Brenner was suspended by the WBC from promoting championship title fights until he explained his position to the WBC or settled with King. At no time prior to trial did Brenner avail himself of either opportunity.

This record does not support a reasonable inference of a conspiracy among appellees and King to advance the interests of King over those of Brenner. Rather, the only conclusion that can be drawn is that the WBC and Sulaiman aided Brenner: they permitted his Arguello-Escalera fight to take precedence despite having denied a similar request by King; Sulaiman acted as intermediary, upon Brenner's request, in settling the dispute with King; and Sulaiman refused to halt the fight when King so requested. Furthermore, the record is devoid of evidence that the WBC and Sulaiman actually knew at any time that King's contracts were defective, if in

fact they were. Brenner claims that evidence exposing the falsity of King's claims was furnished to Sulaiman after the convention and consisted of Brenner's exclusive service contract with Arguello and the affirmations made by the managers of both fighters that Brenner was the promoter of the fight. Brenner asserts that once apprised of this evidence, Sulaiman should have disregarded the convention's instructions. We can find no conspiracy in Sulaiman's adherence to the terms laid down by the WBC convention. The WBC convention had decided to take a position of neutrality. In light of the refusal of the state court and of CBS to find King's contracts invalid, we can hardly say that Sulaiman's adherence to the convention's mandate was suspect. Neither can we conclude that a determination to allow the parties to settle this matter in court or by agreement should be interpreted as conspiratorial or as favoring of one promoter over another.

Moreover, the record belies Brenner's assertion that he was compelled to settle with King. The convention gave Brenner a choice, to resolve the dispute either in court or by settlement. Brenner pursued both paths, soliciting Sulaiman's aid in negotiating with King while he was seeking a court injunction against King. Only when his litigation failed did he agree to a settlement.

Brenner next points to the repeated attempts of Don King to undermine the fight as evidence of the conspiracy. The district court provided the answer when it said that this evidence "shows that King isn't a nice guy, the people he deals with don't think he's a nice guy but that doesn't prove that he entered into a conspiracy with Sulaiman to have Brenner suspended." Tr. at 787-7.

Brenner attempts to save his deficient conspiracy claim by arguing that the district court erred in allowing Don King to invoke his Fifth Amendment privilege against self-incrimination and in refusing to review the invocation of privilege on a question-by-question basis. Brenner asserts that had King been compelled to testify, sufficient evidence of a

conspiracy would have been adduced below. We find no merit in this argument. The district court was aware that King was the subject of a grand jury investigation involving some of the identical claims raised by Brenner, and in its discretion determined that King would be compelled to produce potentially incriminating evidence were he forced to testify. The district court's ruling comports with the standard set forth in *Hoffman* v. *United States*, 341 U.S. 479, 486-87 (1951), that "[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Furthermore, contrary to Brenner's assertion, the district court did solicit challenges to King's invocation of privilege on a question-by-question basis. Brenner presented a list of questions which he planned to ask King were he forced to testify. The district court reviewed the questions and only then concluded that King had properly invoked his Fifth Amendment privilege.[7] There is no error here.

II. *The Group Boycott Claim*

Brenner first contends that his suspension by the WBC constitutes a *per se* unlawful group boycott under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). We disagree.

In general, group boycotts and concerted refusals to deal are considered *per se* unlawful. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *see Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U.S. 457, 465-67 (1941). However, in *Silver* v. *New York Stock Exchange*, 373 U.S.

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7 We also find no merit in Brenner's claims that King improperly invoked a blanket privilege, and that the district court erred in refusing to instruct the jury that it might draw an adverse inference against appellees from King's invocation of his Fifth Amendment privilege. First, it is clear from the record that King did not invoke a blanket privilege but invoked his Fifth Amendment rights on a question-by-question basis. Furthermore, since King was a non-party witness, no adverse inference against appellees could have been drawn from his refusal to testify.

341, 348-49 (1963), the Supreme Court recognized a narrow exception to *per se* invalidity of group boycotts and concerted refusals to deal where a "justification derived from the policy of another statute or otherwise" mandates application of the rule of reason.

Based in part upon the realization that "[i]n some sporting enterprises a few rules are essential to survival," *Hatley* v. *American Quarter Horse Association*, 552 F.2d 646, 652 (5th Cir. 1977), courts have been reluctant to subject the cooperative activities of sports organizations to application of the group boycott *per se* rule. Instead, some courts have confined the *per se* rule to "concerted attempt[s] by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level[,]" *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978), and concluding that the concerted activity at issue did not fall within this paradigm have applied the rule of reason, *see, e.g.*, *NASL* v. *NFL*, slip op. 1001 at 1018-19 (2d Cir. Jan. 27, 1982); *United States Trotting Association* v. *Chicago Downs Association*, 665 F.2d 781, 787-90 (7th Cir. 1981) (*en banc*); *Neeld* v. *NHL*, 594 F.2d 1297, 1298-1300 (9th Cir. 1979); *Smith* v. *Pro Football Inc.*, 593 F.2d at 1178-80 & n.22; *Mackey* v. *NFL*, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1978); *Gunter Harz Sports, Inc.* v. *United States Tennis Association*, 511 F.Supp. 1103, 1115-16 (D. Neb. 1981); *Cooney* v. *American Horse Shows Association*, 495 F.Supp. 424, 430 (S.D.N.Y. 1980). Other courts have recognized that *Silver* creates an exception to the *per se* boycott rule for reasonably self-regulated industries and have evaluated the sports organizations' self-regulation under the tripartite test announced in *Denver Rockets* v. *All-Pro Management Inc.*, 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971)[3] *See, e.g.*, *Linseman* v. *World*

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[3] Under the *Denver Rockets* test, in order for conduct to fall within the *Silver* exception to *per se* invalidation of group boycotts or concerted refusals to deal there must be proof that:

Hockey Association, 439 F.Supp. 1315, 1327 (D. Conn. 1977); *Hatley* v. *American Quarter Horse Association*, 552 F.2d at 652-53.

Brenner does not dispute that professional sports organizations may fall within the *Silver* exception. Instead, he contends that *Silver* is applicable only to sports regulations which insure either that competitors will be fairly matched and will not be exposed to unreasonable risk of injury or that the contest will not be corrupted. Brenner asserts that he was entitled to judgment notwithstanding the verdict on his group boycott claim because the discipline at issue in this case was not directed at either of these objectives and, hence, was unreasonable as a matter of law. We disagree. We reject Brenner's contention that discipline imposed by a sports organization for the violation of rules and regulations aimed at achieving reasonable objectives other than participant parity, safety and league integrity serve no purpose beyond the stifling of competition. Therefore, we decline to find such discipline *per se* unreasonable. "Surely, every disciplinary rule which a league may invoke, although by its nature it may involve some sort of a restraint, does not run afoul of the anti-trust laws." *Molinas* v. *NBA*, 190 F.Supp. 241, 244 (S.D.N.Y. 1961); *see Hatley* v. *American Quarter Horse Association*, 552 F.2d at 653-54. Absent a facial showing of anticompetitive purpose underlying the adoption or enforcement of a rule, the disciplinary activity of a sports organization must be evaluated under either the *Denver Rockets* test or the rule of reason.

In the present case, Judge Metzner properly instructed the

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(1) There is a legislative mandate for self-regulation "or otherwise."

. . .

(2) The collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary [and]

(3) The association provides procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for judicial review.

Denver Rockets v. *All-Pro Management, Inc.*, 325 F.Supp. at 1064-65.

jury that it must find that appellees' conduct constituted an unreasonable restraint of trade if a fair preponderance of the evidence supported either of two conclusions: (1) that Brenner's suspension was effected by appellees to prevent him from engaging in his trade; or (2) that appellees' conduct failed to satisfy any of the prongs of the tripartite *Denver Rockets* test. J. App. at 137a.

Brenner next contends that even if appellees' conduct did not constitute a *per se* group boycott he was entitled to judgment n.o.v. or to a new trial because he proved that, as a matter of law, appellees failed to satisfy various aspects of the *Denver Rockets* test. First, Brenner maintains that the district court erred in holding that he had failed to present evidence that the WBC does not fulfill an inherent need for uniformity fairness and integrity in boxing. Brenner asserts that he presented evidence below establishing that the WBC is corrupt and that its rules are administered in an arbitrary and ad hoc fashion. We find no merit in these claims. We agree with the district court that Brenner failed to substantiate these assertions. In contrast, appellees presented overwhelming evidence that the WBC has established a system of ranking boxers and a body of reasonable rules and procedures designed to insure organized boxing competition arround the world. In this regard, the WBC does not differ significantly from other sports regulatory bodies whose purpose is to insure the organized presentation of sporting events. *See, e.g., Deesen* v. *PGA*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); *Heldman* v. *United States Lawn Tennis Association*, 354 F.Supp. 1241, 1243-44 (S.D.N.Y. 1973); *Molinas* v. *NBA*, 190 F.Supp. at 243-44).

Brenner next asserts that he is entitled to judgment n.o.v. or to a new trial on his group boycott claim because, as a matter of law, none of the four alleged bases for his suspension constitutes a valid ground for excluding him from the market and because the suspension notice which he received

was insufficient.[9] We find both of these arguments to be without merit. On the notice issue, Sulaiman's February 15, 1979 letter to Brenner informed him of his violation of specific WBC rules and urged Brenner either to comply with these rules or to present his side of the dispute to the Grievance and Appeals and/or the Disciplinary Committees of the WBC. This notice was clearly sufficient. *Silver* requires only that Brenner be given "some form of notice and, if timely requested, a hearing. . . ." 373 U.S. at 361.

Similarly, we cannot conclude that Brenner's failure to honor his agreements with the WBC or with its rules were improper bases under Section 1 of the antitrust laws for suspending him from promoting WBC world title fights. Brenner has not presented, nor can we discern, a patently anticompetitive purpose behind the adoption of the WBC's rules or its agreement with Brenner. Neither can we conclude that the executive committee which suspended Brenner was composed of competitors who stood to gain from his suspension. Accordingly, the trial court did not err in instructing the jury to determine, in accordance with the *Denver Rockets* test, whether any of the asserted bases for Brenner's suspension were reasonably related to a policy justifying self-regulation and whether Brenner was given notice of the charges and an opportunity for a hearing.

Finally, Brenner asserts that he is entitled to a new trial on the group boycott claim because the trial court erred in instructing the jury that the burden was on him to prove by

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[9] The asserted bases for the suspension were:

(a) Brenner violated his commitment to the WBC to pay $25,000 to Don King which was a condition to WBC certifying the Arguello-Escalera match on February 4, 1979.

(b) Brenner failed to pay WBC the annual registration fee set for promoters.

(c) Brenner failed to submit to the WBC his contracts with Arguello and Escalera for the match on February 4, 1979.

(d) Brenner failed to submit proof that he was registered as a promoter in any state having jurisdiction for that purpose.

J. App. at 138a-39a.

a fair preponderance of the evidence that the WBC had not satisfied all of the elements of the *Denver Rockets* test. Under Fed. R. Civ. P. 51, in order to raise a challenge to the jury instructions on appeal, a party must object to those instructions before the jury retires to consider its verdict. Since Brenner failed to object to the instructions below, absent plain error, he is precluded from raising this claim on appeal. *Cohen* v. *Franchard Corp.*, 478 F.2d 115, 122-25 (2d Cir.), *cert. denied*, 414 U.S. 857 (1973).

We have recognized that the plain error doctrine, especially in civil cases, should be applied only where the "error [is] so serious and flagrant that it goes to the very integrity of the trial." *Modave* v. *Long Island Jewish Medical Center*, 501 F.2d 1065, 1072 (2d Cir. 1974). Because *Silver* is an exception to the general *per se* invalidation of group boycotts, it is arguable that the burden should be on the defendant to satisfy the tripartite test once the plaintiff has established the existence of conduct which constitutes a group boycott or a concerted refusal to deal. Nevertheless, in light of the unsettled nature of the law in this area, the failure of the district court to place the burden on appellees in the present case was not plain error. Accordingly, we decline to grant Brenner a new trial on this ground.

III. *Costs*

Finally, we find that the taxing of costs against Brenner was a proper exercise of the trial court's discretion despite Brenner's success on appellees' counterclaim for breach of contract. *See Scientific Holding Co.* v. *Plessey Inc.*, 510 F.2d 15, 28 (2d Cir. 1974).

At a stated Term of the United States [illegible] Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of March one thousand nine hundred and eighty-two

Present:

HON. IRVING R. KAUFMAN

HON. WILLIAM H. TIMBERS

HON. THOMAS J. MESKILL

Circuit Judges,

81-7478
81-7556

THEODORE BRENNER, d/b/a TEDDY BRENNER ENTERPRISES,

Plaintiff-Appellant

v.

WORLD BOXING COUNCIL and JOSE SULAIMAN CHAGNON,

Defendants-Appellees

#81-7478
81-7556
#82,0551

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. Daniel Fusaro, Clerk

Arthur Heller
Arthur Heller,
Deputy Clerk

A TRUE COPY by
A. DANIEL FUSARO, CLERK
By [illegible]
Deputy Clerk

JUDGMENT ENTERED 5/3/82
Raymond F. Burghardt
CLERK

948-787

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 4. Jurisdiction of courts; duty of United States attorneys; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

July 2, 1890, c. 647, § 4, 26 Stat. 209; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 25, 1948, c. 646, § 1, 62 Stat. 909.

§ 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

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FILED
JUL 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2301

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THEODORE BRENNER, d/b/a TEDDY BRENNER ENTERPRISES,
Petitioner,

v.

WORLD BOXING COUNCIL AND JOSE SULAIMAN CHAGNON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF WORLD BOXING COUNCIL AND JOSE SULAIMAN CHAGNON, IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a case involving an allegation of an antitrust conspiracy, the assertion of the Fifth Amendment privilege against self-incrimination by a non-party witness, under the control of none of the parties, and who is an alleged but unproved co-conspirator and who is under investigation by a grand jury at the time of trial, gives rise to an inference adverse to the defendant parties, who did testify fully.

2. Whether the evidence presented by plaintiff/petitioner in this case was sufficient to create an issue for the jury as to the existence of a conspiracy prohibited by § 1 of the Sherman Act.

3. Whether all disciplinary actions taken by private sports regulatory bodies, except possibly those directly relating to activities during sporting events, are *per se* violations of § 1 of the Sherman Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2301

THEODORE BRENNER, d/b/a TEDDY BRENNER ENTERPRISES,
Petitioner,

v.

WORLD BOXING COUNCIL AND JOSE SULAIMAN CHAGNON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF WORLD BOXING COUNCIL AND JOSE SULAIMAN CHAGNON, IN OPPOSITION

OPINIONS BELOW

Included in the appendix to this Brief in Opposition are the rulings of the District Court (i) excusing Don King as a witness; (ii) granting a directed verdict on petitioner's conspiracy claim; and (iii) refusing to instruct the jury that an inference adverse to the respondents arises from the assertion of the Fifth Amendment privilege by a witness.

STATEMENT OF THE CASE

The facts of this case are described in great detail in the opinion of the Court of Appeals, Pet. at 1957-70.[1]

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[1] "Pet." refers to the Petition for Certiorari. "J.A." refers to the Joint Appendix in the Court of Appeals. "Tr." refers to the transcript in the District Court.

In sum, the case involves three parties: the petitioner, Theodore Brenner ("Brenner"), a boxing matchmaker and self-described promoter; and the two respondents, the World Boxing Council ("WBC"), an international non-profit membership organization, which recognizes and regulates "WBC World Championship" boxing matches,[2] and Jose Sulaiman Chagnon ("Sulaiman"), the president of the WBC.[3] The WBC, acting through its Executive Committee and Sulaiman, suspended Brenner for multiple violations of the WBC rules, including the rule against breaches of commitments to the WBC. The suspension was to last until Brenner brought himself into compliance with the rules or satisfactorily explained why he should not be required to do so. Instead of taking either of those courses, Brenner sued under § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). He did not attack the substance of the WBC rules, but contended, rather, that his suspension was procedurally defective and that it resulted from an illegal conspiracy among the respondents and a promoter

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[2] The WBC is composed of seven continental federations, representing approximately 100 countries. It was formed in 1963 in order to promote uniformity and reciprocity in world championship boxing matches. Its principal functions are to recognize WBC world champion boxers in various weight divisions and to prescribe rules for fair competition for such championships. Over the years, the WBC has instituted programs (medical and life insurance and standardized medical exams) and regulations (anti-doping tests and rules relating to prohibited substances) to protect the fighters, and it has run training programs and enacted rules both to upgrade the quality of judges and referees and to standardize practices in the ring. Tr. 794-806. Its governing body, the Executive Committee, and its officers receive no compensation and have no commercial interest in boxing. Tr. 816-817.

[3] Sulaiman is a businessman by profession, but has, for over forty years, been involved in boxing as an avocation. Prior to becoming president of the WBC, he served as president of the Mexican Boxing Federation and president of the North American Boxing Federation. He has no commercial interest in boxing and serves as president of the WBC without pay. Tr. 790-793, 816-817.

named Don King.[4] Brenner did not include King as a defendant.

The case was tried to a jury in the Southern District of New York. At the close of the petitioner's case, the District Court granted a directed verdict for the respondents on petitioner's conspiracy claim. The remaining issue, concerning the validity of the suspension, was submitted to the jury, which returned a verdict for the respondents.[5]

Petitioner appealed to the United States Court of Appeals for the Second Circuit, which in a detailed opinion affirmed unanimously.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE FIFTH AMENDMENT ISSUE POSED BY PETITIONER IS NOT PRESENTED BY THE RECORD IN THIS CASE, AND THE FIFTH AMENDMENT ISSUE THAT WAS PRESENTED BELOW WAS DECIDED CORRECTLY.

A. The Issue Posed by Petitioner is Not Presented by the Record in this Case.

The issue posed by Petitioner is whether, in a case where the plaintiff alleges an antitrust conspiracy, an inference adverse to the defendants arises when a co-

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[4] Brenner also alleged that the respondents coerced boxers to sign contracts with King and others; and that they manipulated ratings to favor boxers associated with King and others. The District Court granted a directed verdict for the respondents on each of these allegations, and petitioner has not pursued them in the Court of Appeals or in this Court.

[5] Respondents had asserted four counterclaims against Brenner. One was withdrawn prior to trial. J.A. 80a. At the close of all the evidence, the District Court granted a directed verdict for petitioner on two others. The jury found for the petitioner on the fourth counterclaim. No issue relating to the counterclaims was presented to the Court of Appeals, and none is raised in this Court.

conspirator who is not a party to the case asserts his Fifth Amendment privilege. That issue is not presented by the record in this case because there has been no finding (and there is no evidentiary basis for a finding) that the witness who asserted the privilege was in fact a co-conspirator.

The witness in question was Don King. Petitioner alleged that King was a co-conspirator of the defendants, but petitioner elected not to name King as a defendant. Had he chosen to sue King, he might have been entitled to an adverse inference *against King* from King's assertion of the privilege. But, as a result of petitioner's own strategy in designing his lawsuit, King was merely a non-party witness.

There was no finding that King was a co-conspirator. The District Court, after hearing all of petitioner's evidence, granted a directed verdict for the respondents on the conspiracy claim. The Court of Appeals unanimously affirmed that judgment. Consequently, as the case reaches this Court, King is not a co-conspirator.

The question whether the evidence was sufficient to present a jury question on the conspiracy issue is not one that warrants the grant of the writ. Should the Court be interested, however, in the sufficiency of the evidence on the conspiracy claim, it will find that there was no evidence that respondents conspired with King. The relevant evidence is summarized and analyzed in the opinion of the Court of Appeals, Pet. at 1766-69. The only conclusion permitted by the evidence is that drawn by both the District Court and the unanimous Court of Appeals: "The record does not support a reasonable inference of a conspiracy among appellees and King to advance the interests of King over those of Brenner. Rather, the only conclusion that can be drawn is that the WBC and Sulaiman aided *Brenner* . . . ." Pet. at 1768 (emphasis added).

Therefore, this case does not present any issue concerning the effect of an assertion of the Fifth Amendment privilege by a co-conspirator.

B. The Fifth Amendment Issue Was Decided Correctly by the District Court and the Court of Appeals.

Petitioner sought to compel King's testimony at a time when, as petitioner well knew, "King was the subject of a grand jury investigation involving some of the identical claims raised by Brenner . . . ." Pet. at 1770. The first question, then, was whether King properly asserted his privilege. The second was whether any inference adverse to *the WBC and Sulaiman* arose from *King's* assertion of the privilege.[6]

The District Court, in sustaining King's assertion of the privilege, correctly followed *Hoffman* v. *United States*, 341 U.S. 479 (1951), as the Court of Appeals held. Pet. at 1770. Contrary to the references in the Petition (at pp. i,4) to a "blanket invocation" of the privilege, King asserted the privilege question by question, and the District Court reviewed the propriety of his assertion of it question by question. Pet. at 1770.

No adverse inference *against the WBC and Sulaiman* may be drawn from *King's* assertion of the privilege. No case holds that such an inference against a party to a case may be drawn from the assertion of the privilege by a witness whom the party does not control. *Baxter* v. *Palmigiano*, 425 U.S. 308, 319 (1976), and the other cases cited in Pet. at 6 (with one exception)[7] involved

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[6] Sulaiman testified fully at the trial, both on his own behalf and as the president of the WBC.

[7] The exception is *United States* v. *Maloney*, 262 F.2d 535 (2d Cir. 1959). That was a criminal case in which the prosecutor called three witnesses who asserted the privilege and in his summation commented on the refusal of one of the three to testify. The conviction was reversed for failure of the trial court to admonish the jury "that they must not use the refusal as evidence of what the answer would have been." 262 F.2d at 538. The Court of Appeals commented, "Such refusals have been uniformly held not to be a permissible basis for inferring what would have been the answer . . . ." The decision hardly supports the drawing of an adverse in-

the assertion of the privilege *by a party* and the drawing of an inference *against the party who asserted the privilege.* Here, as the District Court pointed out in ruling that petitioner could not call King as a witness solely to have him assert the privilege, "King was deliberately not named a party defendant and is merely a witness . . . ." J.A. 93a.[8] His assertion of the privilege is therefore irrelevant, for it is well settled that no inference adverse to a party may be drawn from the refusal of a non-party to testify. *See, e.g., United States* v. *Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973); *Bowles* v. *United States*, 439 F.2d 536, 541-42 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 995 (1971); *United States* v. *Atnip*, 374 F.2d 720, 723 (7th Cir. 1967); *United States* v. *Marquez*, 319 F. Supp. 1016 (S.D.N.Y. 1970).[9]

The reason for this rule is clear. "Plainly, the [adverse] inference may not ordinarily be made against a party when a witness for that party claims a privilege personal to the witness, for this is not a matter under the party's control." *McCormick on Evidence* § 76, at 155 (2d ed. 1972). *See also* 8 J. Wigmore, *Evidence* § 2272,

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ference against parties who did *not* refuse to testify. Rather, the decision supports the decision below.

[8] The District Court continued:

> The case has been pending a long time and plaintiff had ample opportunity to amend the Complaint. Having made the choice, the plaintiff is governed by the rule that the fact that a witness has invoked the Fifth Amendment may not be brought to the attention of the jury. To hold otherwise would permit a named defendant to be unfairly prejudiced by a trial tactic that is unjustified.

J.A. 93a.

[9] *See also* Note, *Use of the Privilege Against Self-Incrimination in Civil Litigation*, 52 Va. L. Rev. 322, 331 (1966) ("no inference adverse to either party may be drawn from the refusal of a non-party witness to testify"); *Hinds* v. *John Hancock Mut. Life Ins. Co.*, 155 A.2d 721, 735 (Me. 1959); *State* v. *Reed*, 253 A.2d 227, 230 (Vt. 1969).

at 437 (McNaughton rev. ed. 1961) ("an inference against the party is not to be made because of the witness' claim of privilege").[10] The witness' refusal to testify deprives both parties of his testimony. In the instant case, King was not subject to the control of either party, and neither side should suffer from an adverse inference drawn from his refusal to testify.[11]

Further, as established by the record, King was the target of an extensive and unfocused grand jury investigation. JA 94a, 116a-120a. In these circumstances, any adverse inference in connection with the specific transactions at issue in this case would not be justifiable. As recognized in *United States* v. *Tomaiolo*, 249 F.2d 683, 691 (2d Cir. 1957), when an individual believes that he may be indicted, "it is perfectly consistent with innocence and with nonincriminatory answers to particular questions to refuse to answer any question at all."[12]

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[10] By contrast, Wigmore notes that "[t]he rule does not preclude the inference where the privilege is claimed by a *party to a civil cause*. *Id.* at 438 (emphasis in original).

[11] As observed by Judge Weinfeld in *United States* v. *Marques*:

> A witness who claims his Fifth Amendment privilege exercises a personal right, independent of the prosecution or the defense and is in no way subject to their control. The assertion of a constitutional right which deprives both sides of the witness' testimony should give rise to no inference, favorable or unfavorable, with respect to the nature of the witness' answer had he testified. If in fact the invocation of the Fifth Amendment privilege is of such dimension that it permits no inference of guilt or criminal proclivities, it is without probative value on the issue of the defendant's guilt or innocence . . . .

319 F. Supp. at 1022.

[12] The court further observed:

> Insofar as guilt or innocence is concerned, it is clear that claiming the privilege does not imply any guilt which would be at all inconsistent with later protestations or indications of innocence.

249 F.2d at 691, *following Grunewald* v. *United States*, 353 U.S. 391, 421, 423 (1957).

E. H. Boerth Co. v. *LAD Properties*, 82 F.R.D. 635, 644-45 (D. Minn. 1979), cited in Pet at 7, n.*, is consistent with and, indeed, supports the decision below. There, a witness who was an employee of each of two defendant companies (but was not an employee of the third defendant, an individual) testified in general as to his duties and position with the defendant companies, but refused to answer specific inquiries regarding his knowledge of the financing transactions at issue. The court instructed the jury it could draw an adverse inference against the witness' two employers, *but not against the other co-defendant.* Both the fact of agency and the fact that the refusal to testify was limited to the specific transactions at issue supported the adverse inference against the employers, and both facts distinguish that part of the holding from the circumstances of the instant case; the refusal to permit an inference against the third defendant supports the decision below in the instant case.[18] *United States* v. *Mammoth Oil Co.*, 14 F.2d 705, 729-30 (8th Cir. 1926), *aff'd*, 275 U.S. 13 (1927), and *Molloy* v. *Molloy*, 46 Wis. 2d 682, 176 N.W. 292 (1970), also cited in the same footnote in the Petition, both involved a failure to testify by a *party*.

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[18] The agency principle used to justify the adverse inference in *Boerth* and in *Ralph Hegman Co.* v. *Transamerica Ins. Co.*, 198 N.W.2d 555 (Minn. 1972) (principal-surety), and *Labor Relations Commission* v. *Fall River Educators Ass'n*, 416 N.E.2d 1340, 1344-45 (Mass. 1981) (employer-employee), both cited in Pet. at 8, n.*, does not apply to the instant case. King was not an agent of either the WBC or Sulaiman. There was no finding, and no basis for a finding, that his assertion of the privilege was during the pendency, or in furtherance, of any conspiracy or served the interests of the WBC and Sulaiman, as distinct from King's own interests with respect to the ongoing grand jury investigation of him. And, as recognized in the Notes of the Advisory Committee on Proposed Rules to Fed. R. Evid. 801(d)(2)(E), "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." *See also* 4 *Weinstein's Evidence*, § 801(d)(2)(E), at 801-168 to 801-171.

Consequently, both the District Court and the Court of Appeals were correct in holding that King's refusal to testify did not warrant an adverse inference against the WBC or Sulaiman. Petitioner has not cited any case to the contrary, and respondents are aware of none.

II. THE ISSUE OF THE SUFFICIENCY OF THE EVIDENCE ON THE CONSPIRACY CLAIM WAS CORRECTLY DECIDED BELOW AND DOES NOT WARRANT THE GRANT OF THE WRIT.

Petitioner seeks review by this Court of the granting of a directed verdict on the conspiracy claim at the close of petitioner's case. The District Court held a full and focused hearing before granting the directed verdict. The Court of Appeals exhaustively considered the evidence and the inferences available therefrom (see Pet. at 1757-70) before affirming. As the opinion of the Court of Appeals demonstrates, petitioner simply did not present evidence sufficient to raise a jury issue as to the claim of conspiracy.

Petitioner does not contend that the Court of Appeals applied any incorrect standard or misapplied any applicable rule or principle, or placed itself in conflict with any other circuit, in affirming the judgment of the District Court.[14] Rather, what petitioner wants is a third evaluation of evidence that has twice been found insufficient by the lower courts. That is not what the writ of certiorari is for.

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[14] The citation (Pet. at 10-11) to *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 50 U.S.L.W. 4512 (U.S. May 17, 1982), is inapt. The issue there was whether a non-profit industry association could be held civilly liable for the acts of its agents committed with apparent authority, and the Court held that it could be. In the instant case, no issue of actual or apparent authority is raised. Nor did the *Hydrolevel* case involve any issue concerning the granting of a directed verdict due to the insufficiency of the evidence as to an alleged conspiracy.

III. THE ISSUE OF PER SE ILLEGALITY AS POSED BY PETITIONER IS NOT PRESENTED BY THE RECORD IN THIS CASE, AND PETITIONER'S CLAIM OF PER SE ILLEGALITY IS WITHOUT MERIT.

A. The Issue Posed by Petitioner is Not Presented by the Record in this Case.

The third issue, as posed by petitioner, is whether it was unlawful *per se* for the WBC "to condition a boxing promoter's ability to promote championship contests upon the promoter's payment of money to his competitor." Pet. at ii. That issue is not presented in this case because the respondents did not impose any such condition.

The facts relevant to this issue are set out in the opinion of the Court of Appeals. Pet. at 1757-70. The key facts are these. The WBC had been asked by Don King to approve matches to be promoted by him between Alexis Arguello, the WBC superfeatherweight champion, and Alfredo Escalera and Bobby Chacon. The WBC had, instead, directed Arguello to defend his title next against the number one challenger, Rafael Limon. At that point, Brenner approached the WBC seeking approval of an Arguello-Escalera match to be promoted by him. The WBC—seeking to help Brenner, as the Court of Appeals pointed out—approved Brenner's bout on three conditions: that Limon agree, that the bout not be postponed, and that Brenner resolve the conflicting claims of King, either through court action or otherwise. Brenner sued King, but failed to win a judgment. He commenced negotiations with King, but they stalled. Brenner then enlisted Sulaiman's help, and Sulaiman mediated between King and Brenner until an agreement was reached, under which Brenner was to pay King $25,000. Prior to the bout, Brenner sent King a check post-dated to the day after the bout. King complained to Sulaiman and asked him to cancel the WBC's certification of the bout as a WBC Championship bout. Sulaiman refused, but called Brenner

shortly before the bout to ask for an explanation. Brenner, not telling Sulaiman about his continuing dispute with King (and thus his failure to comply with the conditions for WBC approval of his bout), assured Sulaiman there was no problem, and promised to pay King the money after the fight. On the basis of Brenner's representations, Sulaiman committed to King that Brenner's check would be paid. Tr. 872-73. Prior to the bout Brenner stopped payment on the check, without telling Sulaiman or King. The bout was held without Brenner having paid King, as he had agreed to do. Sulaiman sought an explanation from Brenner, but was unable to obtain one. Subsequently, after notice and an opportunity to appear, which Brenner disregarded, Brenner was suspended for having violated his commitment to the WBC and for other violations of the WBC rules.

The question posed by petitioner depends on a finding that the WBC conditioned Brenner's right to promote WBC bouts on his payment of money to King. No such finding has been made in either the District Court or in the Court of Appeals, nor would any such finding be supported by the record because that simply is not what happened. As the Court of Appeals pointed out:

> [T]he record belies Brenner's assertion that he was compelled to settle with King. The [WBC] convention gave Brenner a choice, to resolve the dispute either in court or by settlement. Brenner pursued both paths, soliciting Sulaiman's aid in negotiating with King while he was seeking a court injunction against King. Only when his litigation failed did he agree to a settlement.

Pet. at 1769. Thus the issue posed by petitioner is not presented by this case.

B. The Claim of Per Se Illegality is Without Merit.

The law applicable to disciplinary actions by sports organizations is summarized in the opinion of the Court

of Appeals. Pet. at 1770-72.[13] The Court of Appeals, like the District Court, correctly applied that body of law in the instant case. Petitioner does not allege any conflict among the circuits or any difficulty in the application of this well-settled and well-understood body of law.

The Court of Appeals held that the District Court had instructed the jury properly on the standards applicable to disciplinary actions. Pet. at 1772-73. It held that the grounds asserted for the disciplinary action were legally sufficient. *Id.*, 1773-74. The jury found the facts against Brenner. All these determinations were properly made.

Petitioner asserts that the Court of Appeals found "that the WBC suspended Brenner principally because Brenner did not compromise a spurious contract claim asserted by King." Pet. at 13. The Court of Appeals made no such finding. Rather, it stated the four asserted bases for the suspension, Pet. at 1774, n.9, and it commented: "[W]e cannot conclude that Brenner's failure to honor his agreements *with the WBC* or with *its rules* were improper bases under Section 1 of the antitrust laws for suspending him from promoting WBC world title fights." *Id.* 1774 (emphasis added). As the jury presumably found from the overwhelming evidence, Brenner was suspended not because he failed to make a payment to King, but because he violated the rules of the WBC.

There is nothing here that warrants plenary review by the Court.

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[13] *See also* J. Weistart & C. Lowell, *The Law of Sports* 642-87 (1979); *Government and the Sports Business* 395-402 (R.G. Noll, ed. 1974); 2 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 6I.07[2], at 6I-50 to 6I-54 (1981).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Theodore Brenner d/b/a Teddy Brenner Enterprises v. World Boxing Council and Jose Sulaiman Chagnon, 80 Civ. 892 (CMM)

This is a motion by defendants for an order excluding from evidence Don King's invocation of the privilege of self-incrimination.

This motion is granted. Mr. King was deliberately not named a party defendant and is merely a witness on the trial. The case has been pending a long time and plaintiff had ample opportunity to amend the complaint. Having made the choice, the plaintiff is governed by the rule that the fact that a witness has invoked the Fifth Amendment may not be brought to the attention of the jury. To hold otherwise would permit a named defendant to be unfairly prejudiced by a trial tactic that is unjustified.

So ordered.

Dated: New York, N.Y.
April 7, 1981

CHARLES M. METZNER
U.S.D.J.

[retyped to enhance legibility]

* * * *

[787-95] THE COURT. All right.

MS. OSTRAGER: Your Honor, may I be heard one more time?

I'm sorry if I misspoke or I didn't make it clear.

The point that I was making was that no promoter had signed both fighters for the Arguello-Limon bout which eventually took place on July 8, 1979. Arguello had not yet signed with any promoter. He hadn't signed as of May 9th, the day that Mr. Sulaiman sent the telegram telling Mr. Arguello's representative that Arguello had to fight a mandatory defense in Madison Square Garden.

THE COURT: Nothing has been submitted to me to justify my changing my ruling of Monday, that there are no facts in this record from which a jury may draw a reasonable inference that a conspiracy existed between King and Sulaiman to have the World Boxing Council suspend Brenner and restrain competition in the field of boxing promotion.

The evidence produced under oath before this jury would justify a finding that King is not to be trusted. He, of course, is free to testify under oath before this [787-96] jury to dispute plaintiff's proof.

On this motion, however, we look at the state of the record.

Even with the undisputed testimony offered by plaintiff, King's activities do not reflect that he and Sulaiman conspired together to violate the antitrust laws as alleged and bringing damage to Brenner.

This claim against the defendant Brenner and the World Boxing Council is dismissed.

MR. COOPER: I assume, your Honor, that also knocks out the second triable issue, which was whether the suspension was pursuant to a conspiracy.

MS. OSTRAGER: Your Honor, I don't think that contention goes out.

THE COURT: No, of course not.

Mr. COOPER: It goes out as to the theory of conspiracy. There is a remaining theory as to why the suspension violated the antitrust laws, and I will address that if I may.

The COURT: The conspiracy is in relation to the antitrust laws, and whether you call it conspiracy or combination makes no difference.

MR. COOPER: Okay.

• • • •

[554] (Recess)

(In the robing room)

THE COURT: I have asked you to come in because I was doing some thinking about comments I made I think yesterday morning or Wednesday evening about the effect of King's taking the Fifth.

As I understand it, Mr. King was originally called for deposition and refused to appear. You then obtained an order to make him appear to assert the privilege to individual questions. Is that correct?

MS. OSTRAGER: Your Honor, originally he refused to appear at all. Then we obtained an order that he had to appear. When he did appear, he asserted a blanket privilege and terminated the deposition. Then I obtained an order to show cause to have him reappear and answer specifically.

THE COURT: All right.

That went on for two days in your attempt to get him to answer questions. I gather from my law clerk that he took the Fifth Amendment over 350 times in that two-day period.

Based on this and the representation by his counsel that he would reassert the Fifth if he appeared on the trial, I directed that he not be [555] put on the stand to go through the same charade that was gone through in March. At the same time I ruled that he had properly invoked the Fifth Amendment to the questions that were asked, and an order has been entered to that effect and sealed.

I have come to the conclusion that the jury has to be charged that he is equally unavailable to both sides and that no inference may be drawn by the jury because of his absence. I would like to read out the charge I am going to give to the jury in this regard:

"You may wonder why Mr. King has not appeared here as a witness. I must instruct you that he was equally unavailable to both sides as a witness in this case. Consequently, you should not speculate as to what testimony he would have given if he appeared as a witness in this case. You shouldn't assume or infer that his testimony would have been favorable or unfavorable to the plaintiff or favorable or unfavorable to the defendant. In short, you should utterly disregard his possible testimony as a factor in this case."

That charge has been given in a criminal case with [sic] the prospective witness had taken the Fifth. [556] It has been approved by the Court of Appeals of this circuit.

MR. ELDRIDGE: May I have the citation that you have reference to?

THE COURT: I don't know it. It is my case, but I don't know the citation.

If you find any authority to the contrary, I am perfectly willing to review the ruling. But I think it is the correct ruling.

MR. ELDRIDGE: Thus far, the only cases that we have been able to locate are by analogy, the principal surety or agency relationship where there is a civil situation as opposed to the criminal case, Your Honor.

I think your suggested charge is the normal rule in a criminal case. I think the rule is different or should be different in a civil case. I have not found an antitrust conspiracy case—

THE COURT: Let's not go into that. I am saying this is the way I am going to rule. If you have any authority to the contrary, I will entertain it.

MR. ELDRIDGE. We will do our best over the weekend, your Honor.

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CLERK

No. 81-2301

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THEODORE BRENNER, d/b/a
Teddy Brenner Enterprises,

Petitioner,

—v.—

WORLD BOXING COUNCIL and
JOSE SULAIMAN CHAGNON,

Respondents.

REPLY BRIEF IN SUPPORT OF A WRIT OF CERTIORARI

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In their Brief in Opposition to the Petition, Respondents contest the existence of the conspiracy among Sulaiman, King and the WBC for the purpose of disassociating themselves from King's invocation of his Fifth Amendment privilege and from King's involvement in the "grand jury investigation involving some of the identical claims raised by [Petitioner] Brenner . . . ." Pet. at 1770.* However, there is overwhelming proof that there was a conspiracy among Sulaiman, King and the WBC to utilize the WBC's power to prevent Brenner from competing with King. Indeed, the undisputed facts reported in the Opinion of

* All references in this Reply Brief to the Petition for a Writ of Certiorari are to the Opinion of the Court of Appeals reproduced in Appendix A of the Petition.

the Court of Appeals establish every element of this conspiracy. Thus, it is undisputed that:

(1) Brenner had valid and enforceable contracts to promote a championship bout between Arguello and Escalera (Pet. at 1758) as well as a contract granting him the exclusive promotional rights to Arguello's services as a boxer (Pet. at 1758);

(2) King falsely asserted non-existent contract rights to the services of Arguello and Escalera* (Pet. at 1758-60);

(3) Sulaiman and the WBC were all aware of the falsity of King's claims** (Pet. at 1760, 1767);

(4) Sulaiman and the WBC supported King's campaign of fraud and interference by compelling Brenner to make concessions to King as a condition to obtaining WBC certification of the Arguello-Escalera bout as a WBC championship bout (Pet. at 1759-60);

(5) King expanded his demands beyond the concessions negotiated on his behalf by Sulaiman (Pet. at 1761, 1768), and demanded that Brenner relinquish all of his contract rights to King (Pet. at 1761);

(6) When Brenner refused to meet King's demand, Sulaiman suspended Brenner as a promoter of championship boxing contests certified by the WBC (Pet. at 1762);

---

* With respect to King, the district court observed:

> "[H]e's not a nice fellow, of low moral character, and the people who deal with him, like Madison Square Garden, feel he breaches their agreements with them. In this case it's been shown he takes contracts signed in blank and fills them in and pre-dates them." Tr. 787-7-8.

** The Arguello and Escalera "contracts" sponsored by King (PX 32, 32A) were invalid on their face. Tr. 853, 1128, 1131. *See also* Tr. 448-24-26, 448-76-77, 570-572. Sulaiman admitted that he knew in December 1978 "that Mr. King had submitted *invalid* contracts for an Arguello-Escalera match to the World Boxing Council." Tr. 1131 (emphasis added).

(7) Sulaiman and King had a close relationship (PX 52, 250, 234, 238, 239, 288; *see* Tr. 448-33-35, 503, 533) and were in contact with one another immediately prior to Brenner's suspension (Pet. at 1761);

(8) At the time of the suspension, Sulaiman was fully aware of the extent to which King was overreaching (compare PX 73 and 86 with PX 80; PX 99);*

(9) After suspending Brenner, Sulaiman *ordered* Arguello to fight under the promotional auspices of King (PX 123; Tr. 169-71, 180, 448-58-60, 448-63-66), thereby enabling King to appropriate all of the benefits of Brenner's contract with Arguello (Pet. at 1766); and

(10) Sulaiman and King engaged in large cash transactions other than in the ordinary course of the WBC's business (Pet. at 1762. *See also* PX 234, 238, 239; Tr. 645-650, 965-966).**

The essential theme of respondents' presentation is that Sulaiman was constrained to suspend Brenner because Brenner failed to honor his commitment to Sulaiman to pay King $25,000; that Sulaiman did not know Brenner's version of his dealings with King; and that Brenner was disciplined because he failed to present any explanation to the

---

* Trial Exhibits PX 73, PX 80, PX 86, and PX 99 are reproduced in Appendix A to this Brief. This correspondence documents Brenner's compromise with King (PX 73, 86); the principal role Sulaiman played in negotiating the compromise (PX 73, 80, 86, 99); King's repudiation of the compromise (PX 80); and most importantly, Sulaiman's complete knowledge of the rectitude of Brenner's position (PX 86).

** The financial transactions between Sulaiman and his alleged co-conspirator support an inference of conspiracy. *Cf. Beech Cinema, Inc.* v. *Twentieth Century-Fox Film Corp.*, 622 F.2d 1106, 1109 (2d Cir. 1980).

WBC for withholding the $25,000 payment to King.* In the morality play constructed by respondents, Brenner was properly punished for his "breaches of commitments to the WBC" (Br. at 2), and his arrogance in refusing to explain his position to Sulaiman.

This view of events presupposes (as Sulaiman claims) that Sulaiman never received Trial Exhibit 86 in which Brenner explained his position at great length. But there is irrefutable proof that Sulaiman *did* receive this letter. Indeed, on February 13, Sulaiman addressed a letter to Brenner that acknowledged receipt of the letter and referenced a conversation with Brenner about its contents. PX 99.

In short, there was a conspiracy that included Sulaiman and King and the Fifth Amendment issue posed by Petitioner is most certainly presented by the record in this case.

With respect to the issues raised by co-conspirator King's pretrial invocation of the Fifth Amendment, respondents assert that Petitioner must establish a basis in agency law for the attribution to respondents of King's testimony. Br. at 6-8. Petitioner does not contend otherwise. The basis for vicarious attribution on which Petitioner relies is the agency relationship created by the conspiracy. *Lutwak* v. *United States*, 344 U.S. 604, 617 (1953); *Clune* v. *United States*, 159 U.S. 590, 593 (1895). Since King's testimony (or the inferences properly drawn from his invocation of the Fifth Amendment) was admissible against the respondents, it was reversible error for the district court to deny Brenner's request to charge the jury that it could

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* Petitioner contends that the Sherman Act precludes a self-appointed regulatory group which controls access to an economic market from conditioning one competitor's access to the market upon concessions to another competitor.

draw an adverse inference against the respondents from King's invocation of the Fifth Amendment.

If the law were otherwise, the already well recognized difficulties of establishing a civil antitrust conspiracy claim would be rendered insurmountable. Moreover, unless such inferences are permitted, antitrust plaintiffs would be constrained to join as defendants parties who would otherwise not be sued. See Kaminsky, *Preventing Unfair Use of the Privilege Against Incrimination in Private Civil Litigation: A Critical Analysis*, 39 Brooklyn L. Rev. 121, 152-53 (1972). It is respectfully submitted that contrary to the view apparently held by the lower courts, unnecessary proliferation of litigation does not promote the interests of justice and non-party conspirators should not be allowed to use the Fifth Amendment as a sword to protect co-conspirators. *Cf. United States* v. *Hilton Hotels Corporation*, 467 F.2d 1000, 1005-1006 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

Finally, under the antitrust laws, the only permissible functions of the WBC relevant to this case are to award the title of WBC champion to professional boxers in various weight divisions and to rate contenders for WBC championships.*

---

* The trial record documents how this fundamental power has been perverted by Sulaiman and the WBC to anticompetitive purposes. Basically, the economics of broadcasting limit televised boxing matches to championship contests. Thus, by controlling access to television, the principal source of revenue in boxing, the WBC is positioned to extort "sanction" fees from promoters that bear no relationship to any service rendered by the WBC. The WBC's power over the domestic boxing industry is sufficiently alarming to have attracted congressional attention in hearings before the Subcommittee on Labor Standards of the House Committee on Education and Labor in 1979 in connection with proposed legislation to establish a Federal boxing board. Hearings on the creation of a Federal Boxing Board, H.R. 2726, 99th Cong., 1st Sess., April 1979.

Petitioner has never contested the appropriateness of the WBC's power to designate contenders for WBC championships and the order in which the contenders are privileged to compete for WBC titles. However, once the WBC determined that Arguello and Escalera were suitable opponents for a championship bout, the WBC could not, consistent with the antitrust laws, condition Brenner's promotion of that fight upon commercial concessions to King. *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 458 (1945). *Cf. United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 33-34 (1960).

In sum, the theory of this case does not search the frontiers of the antitrust laws; the predatory and atavistic acts complained of are precisely the kind of evil that Section 1 was designed to eradicate.

Conclusion

For all the foregoing reasons, Petitioner respectfully submits that the errors identified in the Opinion below warrant correction by this Court and the issuance of a Writ of Certiorari to the Second Circuit.

Respectfully submitted,

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200 Park Avenue
New York, New York 10166
(212) 880-4400

July 30, 1982

APPENDIX

PX EXHIBIT 73 IN EVIDENCE

MARATHON ENTERTAINMENT

January 22, 1979

Mr. Jose Sulaiman
Consejo Mundial De Boxeo
(World Boxing Council)
Apartado Postal 75-254
Mexico 14, D.F.
Mexico

Dear Jose:

Enclosed find letter and check that was delivered to Don King's office Tuesday morning, January 23, 1979.

Thank you.

Very truly yours,

/s/ TEDDY BRENNER
Teddy Brenner

TB/Pg
Enc.

Exhibit 73

MARATHON ENTERTAINMENT
110 East 59th St., New York, N.Y. 10022 (212) 753-3860

ALAN LUBELL *President*

January 22, 1979

Mr. Don King
Don King Productions
32 East 69th Street
New York, N.Y. 10022

Dear Don:

This letter will summarize our understandings with respect to the compromise of the claims you have asserted to the services of the participants in the Alexis Arguello/Alfredo Escalero World Boxing Council Championship Bout presently scheduled to be held on February 4, 1979. It is understood that in return for payment by me to you of $25,000.00, as represented by the enclosed check dated February 5, 1979, you will relinquish any claim to this bout.

We have further agreed that the enclosed check may only be cashed on and after February 5, 1979, and then only if the Arguello/Escalera bout scheduled for February 4, 1979 is actually conducted as a Championship Bout sanctioned by the World Boxing Council.

Very truly yours,

/s/ ALLAN LUBELL
Allan Lubell

AL/pg
Enc.

Accepted and Agreed to by:

.....

January , 1979

PX EXHIBIT 80 IN EVIDENCE

January 30, 1979

Mr. Jose Sulaiman, President
World Boxing Council
Apartado 75-254
Mexico City 14, DF
MEXICO

Dear Mr. Sulaiman:

I want to confirm the determination of and resolution by the World Boxing Council of certain disputes relating to the promotion of upcoming prizefights for the W.B.C. super feather-weight championship and the commitment of the parties involved to be governed and bound by that determination and resolution.

There were three commitments regarding the title in question: i) an Arguello/Chacon bout to be promoted by Don King Productions, Inc.; ii) an Arguello/Escalera bout to be promoted by Teddy Brenner (to which we objected because, *inter alia*, of a contract between us and Mr. Escalera); and iii) a W.B.C. ordered defense by Mr. Arguello against Radfael Limon.

The W.B.C., pursuant to its authority and in accordance with its rules and regulations, determined that the following be the order and procedure regarding super feather-weight championship defenses:

1. the Arguello/Escalera bout shall proceed first and be promoted by Teddy Brenner. An economic settlement has been reached between Mr. Brenner and us so that he shall be the sole promoter of the Arguello/Escalera bout subject to his payment to us of an agreed upon sum. Mr. Brenner has delivered a post-dated check to us for the

Exhibit 80

agreed upon sum with a letter indicating it will be good immediately following the subject bout;

2. the winner of the Arguello/Escalera bout shall next meet Radfael Limon in a mandatory title defense. As you know, we have already reached agreement for that defense with Mr. Limon. And, for your information, Mr. Brenner has agreed with us that if he has any promotional rights to or relating to the services of said winner, he has and will waive them and will not otherwise interfere with our promotion of said defense in consideration of our forbearing any objection to his promoting an Arguello/Escalera bout first;

3. the winner of the bout described in paragraph 2 above shall, as his next title defense, meet Bobby Chacon in a title bout to be promoted by Don King Productions, Inc. As noted in paragraph 2 above and for the same consideration, Mr. Brenner has agreed that if he has any promotional rights to or relating to the services of said winner he has and will waive them and will not otherwise interfere with our promotion of said defense.

Please advise us immediately if the foregoing is not accurate in every regard. In addition, we are sending Mr. Brenner a copy of this letter with the same request.

Sincerely,

DON KING PRODUCTIONS, INC.

By: CONSTANCE HARPER

cc: Mr. Teddy Brenner (By Hand)
ABC Sports, Inc. (By Hand)
John A. Guzzetta, Esq. (By Hand)

PX EXHIBIT 86 IN EVIDENCE

MARATHON ENTERTAINMENT
110 East 55th Street
New York, New York 10022
212-753-3860

February 2, 1979

Mr. Don King
Chairman and Chief Executive Officer
Don King Productions, Inc.
32 East 69th Street
New York, N.Y. 10021

Dear Mr. King:

We have your letter of January 30, 1979. So that there is no further misunderstanding, we wish to simply state that it does not reflect the understanding that we have reached concerning the Arguello/Escalera bout, which is scheduled for February 4, 1979. The only understanding which we reached is set forth in full in the attached letter to you dated January 22, 1979, copies of which have been furnished to Mr. Sulaiman and ABC Sports.

We do not acknowledge any claims you may have to the promotional rights to the services of either Arguello or Escalera and we consider ourselves free to arrange bouts involving these fighters in which Limon and/or Chacon may be participants.

We expressly reject your assertion that we have by words, or conduct, acquiesced in any arrangement which grants you the right to promote any further bouts involving Arguello or Escalera. You are now attempting, at this late date, to impose additional conditions on the agreement which we reached on January 22, 1979.

Exhibit 86

While we are ready, willing and able to perform our obligation under the January 22, 1979 agreement, we will not permit ourselves to be disadvantaged by your overreaching. We have, therefore, instructed our bank not to honor the check dated February 5, 1979, which was tendered to you in full satisfaction of all disputes between us concerning the promotional rights to the services of Messrs. Arguello and Escalera. We trust that you understand our position.

Upon our return, we are prepared to meet with you, at a time and place convenient to you, to make a good faith attempt to resolve our differences in this matter. We wish to stress that we remain ready, willing and able to honor all of the undertakings which we made in our January 22, 1979 agreement, provided that you are willing to adhere to the terms of that agreement.

Sincerely yours,

TEDDY BRENNER

TB/pg
cc: Mr. Jose Sulaiman, World Boxing Council
ABC, Sports
Bcc: Bob Arum, Top Rank

PX EXHIBIT 99 IN EVIDENCE

JOSE SULAIMAN
President

February 13, 1979

Mr. TEDDY BRENNER
110 East 59th Street
New York, N.Y. 10022
U. S. A.

Ref: JS-1755

Dear Teddy:

I am referring to your telephone call and your letter of February 2.

The W.B.C. with the exclusive wish to help, you, accepted the voluntary defense of Arguello against Escalera for your promotion.

However, in order to do so, we were very clear that the winner of that fight must make a mandatory defense against Limon for the promoter who signs both of the fighters or otherwise if not, for he who wins the purse offer.

There is a contract for a fight against Bobby Chacon signed for promoter Don King. This cannot be put aside and not be respected and so I informed you very clearly.

What the W.B.C. decided in a convention, the final in accordance to our Constitution and Populations to which all promoters promoting W.B.C. world title fights must abide.

Sincerely yours,

JOSE SULAIMAN Ch.
President